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No. 12785

In The

United States Court of Appeals

For the Ninth Circuit

FARMERS INSURANCE EXCHANGE, also known as FARMERS AUTOMOBILE INTER INSURANCE EXCHANGE, *Appellant (Defendant)*

vs.

LOUISE K. HOLM, *Respondent (Plaintiff)*

Appeal from the United States District Court
for the District of Oregon.

HONORABLE CLAUDE C. McCOLLOCH, Judge

Appellant's Reply Brief

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I. REBUTTAL ARGUMENT

1. The present case is ruled by *Craswell v. Biggs*, 939, 160 Ore. 547, 86 P. (2d) 71.

The issues in that case which are identical with those n the present case include the authority of an agent to reate an estoppel against his principal, the power of n agent to extend coverage of a bond when not ex-ressly authorized, and the effect to be given to a con-ersation about a future transaction. In essentials, the acts of the *Craswell* case are similar to those of the

present case. There a general contractor sued a defaulting subcontractor and the surety on his bond for a loss arising from the subcontractor's default on the second of two sections of the principal contract. The surety had bonded the subcontractor on the first section, and it was the plaintiff's contention that the coverage of that bond had been extended to include work on the second section by means of a conversation with the surety company's resident vice president. The court found against the plaintiff.

At page 557 of the Oregon Report, the court says:

> "An agent's statement is not binding upon his principal unless the agent was acting within the scope of his authority, either real or apparent."

The court goes on to hold that the agent in question, despite the office he held—

> "had no real or apparent authority to extend the coverage of the bond."

In regard to estoppel and waiver the court further says, at page 567 of the Oregon Report:

> "The defendant surety company is not bound by any estoppel or waiver unless it be established that the waiver or the estoppel resulted from the acts of an agent who possessed authority to create a waiver or an estoppel."

The language and the holding of that case are directly applicable to the case at bar.

2. Unlike the case at bar, in the *Fagg* case an agent having authority to bind his principal in that respect was held to have bound the company by orally consenting to a transfer of an insurance policy.

Respondent asserts that the case of *Fagg v. Massachusetts Bonding and Insurance Co.*, 142 Ore. 358, 19 P. (2d) 413, controls this case. It does not. The facts are: The owner of the car involved in the accident had transferred it to another person, whose name was Day. The former owner and Day together consulted the president of an incorporated agency which was the general agent for Oregon for the defendant insurer. The original owner and policyholder explained to the president of the agency that he had transferred the car to Day, and asked him whether it would be necessary to obtain the insurance company's consent in order to make the policy available to Day and his family. The president of the agency told both men that no consent would be necessary. Thereupon Day, the new owner, paid to the president of the corporate general agent of defendant the premium then due on the policy, which the former owner had not yet paid. Surely no clearer case of consent to and ratification of an assignment by an authorized agent could have been presented.

Contrast the case now before the Court, where a proposed, rather than a consummated, transaction was discussed with a solicitor, a man of limited authority; and where according to the testimony of von Borstel, the owner and policyholder, (Tr. pp. 63, 65) the agent told him not that no consent was needed, *but that the new owner would have to sign for the policy*. (Respondent's brief nowhere mentions this portion of the agent's statement.)

Moreover, in discussing the authority of agent Lawrence, who made the disputed representations, respondent elsewhere states that Lawrence had the authority to write insurance. As appears from Tr. p. 151, this statement is false. Lawrence had merely authority to solicit insurance. What is more, as in the *Craswell* case, supra, he had no authority whatsoever to give the Exchange's consent to the sale, transfer or assignment of insured property. Contrast the *Fagg* case, where the Court found at page 370 of the Oregon report that the insurer's general agent—

> "had authority to solicit and write insurance and to fill out the necessary papers consenting to the sale, transfer or assignment of insured property."

It thus appears that the *Fagg* case differs from the present case on exactly those points which are required to

create an effective estoppel, for (1) the agent in the case now before the Court had no authority to extend the coverage of the policy to a new owner (2) the statements he made, taking von Borstel's version, made it clear that some papers had to be signed at the new owner's first convenience, (3) and the agent never saw or spoke to the new owner, nor ever knew until after the accident that the proposed transfer had been carried out.

3. Even in its own jurisdiction, *Virginia Mutual Auto Ins. Co. v. Brillhart* is not good authority for the point for which respondent cites it.

Respondent quotes a long statement from *Virginia Automobile Mutual Insurance Co. v. Brillhart*, 1948, 187 Va. 336, 46 S.E. (2) 377, as authority that a mere soliciting agent may extend the coverage of policy to a new owner as respondent alleges was done in the present case. The case is in flat contradiction with cases cited in appellant's opening brief at page 33. Moreover, the Virginia Court's opinion in that case gives no indication that its attention was drawn to this rule or that it had the point in mind. No other Virginia case in accord with it was found. If good law, it overrules, without mentioning, *Foreman v. German Alliance Ins. Co.*, 1905, 104 Va. 694, 52 S.E. 337, 113 Am. St. Rep. 1071, 3 L.R.A. (NS) 444, holding squarely and expressly that the

knowledge acquired by the insurer's *general* agent acting outside of the scope of its agency would not be imputed to the insurer unless present in mind when later acting for the insurer. The authority of the case is further weakened by a consideration of *Royal Indemnity Co. v. Hook*, 1931, 155 Va. 956, 157 S.E. 414, on which the Court in the *Brillhart* case expressly bases its decision, and on two more recent Virginia cases, *State Farm Fire Insurance Co. v. Rakes*, 1948, 188 Va. 239, 49 S.E. (2) 269, and *Ambrose v. Acacia Mutual Life Insurance Co.*, 1949, 190 Va. 189, 56 S.E. (2) 372. The first of these three cases holds an insurance company is bound by knowledge relative to the ownership of a car acquired by a soliciting agent in the course of arranging an application for insurance. The two cases last cited hold the same, and cite as authority for their decision the *Brillhart* case. It is thus apparent that in the *Brillhart* case the Court was not aware that it was not merely following the general rule that knowledge acquired by an agent within the scope of his agency is imputable to his principal. The case thus cannot be regarded as good law even in Virginia. Even if the case were respectable authority, nonetheless it could not stand against the squarely opposed holdings in Oregon, of which *Bartnik v. Mutual Life Insurance Co. of New York*, 1936, 154 Ore. 446, 60 P. (2) 943, is typical.

4. The evidence indicates that the extension of coverage contended for by respondent would probably have increased the risk. The language quoted from *Virginia Mutual Auto Insurance Co. v. Brillhart*, supra, by respondent at page 10 of his brief, indicates that this fact may be of some slight importance, and respondent accordingly makes an attempt to bring himself within this rather unreliable case by pointing out that in many of the cases cited in appellant's brief the risk which the policy was supposed to have been extended to cover was a greater one calling for a higher premium. Appellant cannot see a distinction in this regard between those cases and the present one. Respondent made no showing that the risk in the instant case would not be increased by extending coverage to Elmer Sondenaa. Having never had an application from either of the Sondenaas, appellant has no knowledge as to whether the risk would have been increased or not. Nonetheless, appellant did introduce testimony through Mr. Smith (Tr. p. 153) indicating that the personal record of an applicant was an important factor in estimating the risks. Moreover, the Court will take judicial notice of the physical features of its own jurisdiction; and the Court therefore knows that Kent, in Eastern Oregon, lies in relatively flat and open country where the weather is normally dry, and that Toledo,

where the Sondenaas live, is in the foothills of the Coast Range of Oregon, where the roads twist among the densely forested hills, pavements are frequently wet and logging trucks add to the hazard. This much at least is true: that it cannot be said as a matter of law that a twenty-three year old boilermaker with no assets to his name, who lives in a hilly, rainy, logging area, is a better risk for an automobile insurance policy than a fifty-three year old substantial farmer living in dry and level farming country.

5. No issues of estoppel or waiver were present in *State Farm Mutual Auto Ins. Co. v. Porter*, and on the facts the cases are even farther apart. This case was decided by this Court in 1950, 186 F. (2) 834, rehearing denied February, 1951. At page 16 of his brief it is asserted that this case holds that acts of the insurer after loss may estop an insurer from relying on the facts of non-coverage. The case lays down no such rule. This Court there held that the facts of that case established that coverage existed under the policy *at the time of the accident*. The Court therefore refused both in its original opinion and its per curiam opinion denying the petition for rehearing to consider the issues of estoppel and waiver, also argued by the parties. In the case now before the Court, it is quite clear there was no coverage

applicable to the Sondenaas at the time of the accident, and the case is therefore not relevant on this point.

It may be further noted that the *Porter* case was decided under California law. Whatever may be the law in that state, in Oregon estoppel can be founded only on acts on which plaintiff relies to his prejudice and so necessarily on acts or representations made to the insured before the loss. See cases cited at page 29 of appellant's opening brief.

6. Under the Oregon statutes the filing of a Form SR-21 by appellant had no effect whatsoever upon its liability under its policy with von Borstel.

Respondent contends that appellant's action in filing a Form SR-21 made the appellant absolutely liable to any persons injured as the result of the accident, without regard to the underlying contract of insurance. In this respondent is plainly in error.

This form is called for by the next to the last sentence of O.C.L.A. Sec. 115-416, subsection (a). Section 416 requires the Secretary of State within forty-five days of receiving an accident report to suspend the license of an operator and the plates and registration of the owner of any car involved in the accident if it resulted in damage to property or injuries to persons, unless the owner or operator has sooner filed proof of financial responsi-

bility. This section did not apply to von Borstel, in the present case, for by Section 416 (a) 2, persons having in force a standard automobile liability policy at the time of any such accident are exempted from the application of this statute. The fact that such a policy was in force is established by the certificate of the insurer on Form SR-21, as required by Section 416, as last amended by O.L. 1945, c. 144:

> "Upon receipt of notice of such accident, the insurance carrier or surety company which issued such policy or bond shall furnish for filing with the Secretary of State a written notice that such policy or bond was in effect at the time of the accident."

Exactly this course of action was followed in the present case on behalf of von Borstel, appellant's policyholder. It will be recalled that on appellant's records von Borstel was still the owner of the 1940 Plymouth involved in the accident, and that as recently as three days before the filing of Form SR-21 he had told the Exchange's agent that he was the registered owner thereof. It is thus apparent that filing of the form had no effect on the insurer's liability, but served only to prevent the suspension of von Borstel's several registrations and plates otherwise required by Section 115-416.

It is further to be noted that under O.C.L.A. Section 115-419, the insurer's liability becomes absolute "whenever loss or damage covered by such policy occurs," (O.C.L.A. Sec. 115-419 (b) 1, as amended by O.L. 1943, c. 295), not "when Form SR-21 is filed." This language was apparently chosen to prevent avoidance of the policy to the detriment of persons already damaged or injured by the policyholder's breach of such conditions subsequent as the usual requirements of prompt filing of the proof of loss, prompt notification of accident, and full cooperation of the insured with the insurer. If this meaning were not clear from the words themselves, it becomes so upon consideration of Section 419 (b) 3, as amended by O.L. 1943, c. 295. That section states that in cases where the insured has breached the policy the insurer may require reimbursement from him for any damages it has had to pay to the injured person under the absolute liability statute above quoted; that section further allows an insurer to defend against the demands of the injured person in excess of the statutory financial responsibility limits by asserting the breach of conditions subsequent on the part of the insured.

Thus the very statutes cited (and misquoted) by respondent speak for appellant's position. These statutes make plain a legislative policy that liability shall be imposed only when loss or damage occurs which is

covered by the policy. There was no coverage in the case now before the Court.

II. COMMENT ON RESPONDENT'S ANSWER TO APPELLANT'S BRIEF

1. Respondent appears to concede appellant's specification of error No. 4. See page 22 of respondent's brief, where it is conceded that the question of estoppel should have gone to the jury. However, it is also apparent that respondent believes that the issue of estoppel was so submitted.

As appears from the charge of the Court (given in full in Appendix B, pages 57 to 60 of appellant's brief), and as respondent states on page 23 of her brief, the only question submitted was the narrow one whether von Borstel's or Lawrence's version was the one the jury believed. The Court found the facts constituting estoppel itself, so far as appears.

Appellant's position, of course, is that as matter of law the evidence was insufficient to justify a finding of estoppel. However, if there had been evidence of all the elements of estoppel, we agree with respondent that under those circumstances the issue of estoppel should have been submitted to the jury. The case of *Fagg v. Massachusetts Bonding and Insurance Co.*, supra, so

holds. If there was such evidence of all elements of estoppel, then the Trial Court erred in failing to submit this issue to the jury in its entirety.

2. Respondent fails to meet appellant's contention that the trial court erred in failing to charge evidence favorable to defendant as well as that unfavorable to it.

Respondent says nothing in reply to appellant's contention set forth at pages 23 to 26 of its opening brief that a federal trial court must give both sides of the evidence in commenting thereon or in summing it up, and that its failure so to do, over objection, is prejudicial error requiring reversal.

As respondent points out, the Trial Court's charge in the present case was not so grossly prejudicial as that of the Court in *Virginia Railroad v. Armentrout*, 166 F. (2) 400, 4 A.L.R. (2) 1064, for that was an extreme example, but as indicated in appellant's opening brief referred to above, the charge need not reveal the judge's prejudice, if any; it is enough if it fails to give a summary of both sides of the evidence upon a disputed point. *Sperber v. Connecticut Mutual Life Insurance Co.*, CA8, 1944, 140 F. (2) 2, cert. den. 321 U. S. 798, 88 L. Ed. 1087, 64 S.Ct. 939. The Court's error in this respect was further aggravated in that the summary of von Borstel's version given in the charge omitted two qualifi-

cations, both favorable to defendant, which von Borstel had indicated were a part of Lawrence's statement to him. See appellant's opening brief, pages 23-26, and see Tr. pp. 63, 65.

CONCLUSION

Though it is regularly held that a contract of insurance will be construed most strictly against the insurer and in favor of the assured, it has not yet been held that the contract can be wholly disregarded. Policies are not written to protect all the world, or even to protect all successors in title to particular automobiles or other personal property. They are written to protect the interest of an individual; and when the individual named in the policy has no interest in the subject matter of the contract, the policy is void. This was the difficulty that confronted the Oregon Court in *Mercer v. Germania Ins. Co.*, 88 Ore. 410, 171 P. 412.

The purpose of the policy in the present case was to protect Mr. von Borstel from any liability to which he might be exposed by reason of his ownership, maintenance or use of a particular vehicle. The policy furnished no coverage beyond the period of his ownership, use or maintenance, and in being so limited in time was in complete compliance with O.C.L.A. Sections 115-418

and 115-419, as amended by O.L. 1943, c. 295. Strangers to the contract, such as the Sondenaas, have three courses of action if they wish to recover either on the contract or upon quasi-contract against the insurer. They may bring themselves within its plain terms. This has not been done in the present case. They may alternatively show that the insurer, by waiver or ratification, recognized them as parties to the contract. Respondents have failed in this also. Finally, they may attempt to show that the insurer is estopped to assert the fact that they are strangers to the contract. Respondents have likewise failed in this course.

Respectfully submitted,

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